RESPONSE OF CLIFFORD CHANCE LLP TO THE CMA'S CONSULTATION ON THE DRAFT SUSTAINABILITY GUIDANCE

Clifford Chance LLP welcomes the opportunity to respond to the CMA's Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 (**CA98**) to environmental sustainability agreements (the **Draft Guidance**). Our comments below are based on the substantial experience of our lawyers of advising on antitrust laws for a diverse range of clients, and across a large number of jurisdictions. However, the comments below do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

RESPONSE TO CONSULTATION QUESTIONS

1. **Are the content, format and presentation of the Draft Sustainability Guidance sufficiently clear? If there are particular parts of the Draft Sustainability Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.**

Section 3 of the Draft Guidance

1.1 As regards Section 3 of the Draft Guidance, we welcome the CMA's approach of setting out those agreements and concerted practices that are unlikely to infringe the Chapter I prohibition. We consider that the examples cited are relevant and are likely to be of real help to undertakings.

1.2 Our overarching comment on this Section is that the repeated caveat that the examples cited in Section 3 are "unlikely" to infringe the Chapter I prohibition is an unnecessary and unhelpful caveat. In particular, a key benefit of the Draft Guidance to undertakings is that, if their agreements "*clearly correspond to examples used in"* the Draft Guidance, the CMA will not take enforcement action against those undertakings. The examples in the Draft Guidance are therefore of key importance.

1.3 The "unlikely" caveat detracts from this. This is because the qualifier creates the impression that the Draft Guidance is 'hedging' on whether certain types of agreements may or may not infringe the Chapter I prohibition, with the consequence that, even if undertakings closely mirror the examples in the Draft Guidance, the CMA may have recourse to enforcement action, since the Draft Guidance states that the examples are merely "unlikely" to raise issues. Considering severe implications of failing to comply with competition law , undertakings may consider there to be significant risks in relying on the protections offered by the Draft Guidance and may instead either: (i) avoid engaging in these beneficial agreements on a cautious basis; or (ii) approach the CMA even for uncontroversial agreements to gain protection from fines (thereby unnecessarily taking up valuable CMA resources).

1.4 Rather, we suggest that the Draft Guidance should state that the CMA will act on the basis that the examples "*will not*" infringe the Chapter I prohibition, even if the CMA can hypothesise of rare examples in which the Chapter I prohibition could be engaged, considering that:

1.4.1 First, many of the examples quite clearly do not infringe the Chapter I prohibition, yet they are still caveated by the "unlikely" qualifier. For example, Paragraph 3.3.1 refers to an intra-group agreement. It is uncontroversial that this will not infringe the Chapter I prohibition, since intra-group agreements fall outside the prohibition. The CMA should therefore have no issue being more forthright in stating that such agreements "*will not*" infringe the Chapter I prohibition.

1.4.2 Second, most of the examples already contain their own caveats, such that the hypothetical cases in which the examples could infringe the Chapter I prohibition are vanishingly rare. The upside of including the additional layer of caveat (i.e. that these examples will be "unlikely" to infringe the Chapter I prohibition) is therefore very small indeed, and outweighed by the benefit of offering undertakings certainty. For example:

(a) Paragraph 3.4 refers to a joint initiative by undertakings that would not independently have been able to carry out the initiative. For this example, the Draft Guidance caveats that there could be an issue if the businesses could have carried out the initiative using a less restrictive form of cooperation. Provided the caveat is satisfied, it is difficult to see the circumstances in which such joint initiatives could infringe the Chapter I prohibition. The Guidance should therefore state that, provided the caveat is satisfied, the agreement "*will not*" infringe the Chapter I prohibition.

(b) Paragraph 3.10 refers to an agreement to pool information about the environmental sustainability credentials of customers, but without sharing competitively sensitive information about prices or quantities those customers purchase. Again, provided competitively sensitive information is not shared, it is difficult to see the circumstances in which this could infringe the Chapter I prohibition.

Section 4 of the Draft Guidance

1.5 Paragraph 4.14 of the Draft Guidance indicates that a relevant factor in assessing the competitive effects of a relevant agreement is whether it is "*likely to lead to an appreciable increase in price or reduction in output, product variety, quality or innovation*." It will, however, often be the case that a sustainability agreement leads to an increase in price, but at the same time an increase in product quality. For instance, parties may agree to phase out environmentally harmful products in favour of environmentally friendly products that are valued more highly by consumers, such that consumers are willing to pay more for them. If there is an increase in price, but an overall improvement in the price, quality, range and service levels of a product offering (the overall PQRS, which the CMA often considers in merger control cases, for example), would that overall improvement fall to be considered (i) an efficiency under section 9 CA98[1] (the **Chapter I Exemption**) or (ii) might it be treated instead in the same way as would a price *decrease* in a case where quality, range and service-levels

[1] This appears to have been the approach taken by the Dutch competition authority in the "Chicken of Tomorrow" case (ACM, Case Number 13.019566, 26 January 2015)

remain the same, and therefore fall outside the Chapter 1 prohibition for absence of anticompetitive effects? On the basis of existing case law, we consider that the former approach is more likely to be the correct one, but this should be clarified in the Guidance.

2. **We are keen to ensure that the Draft Sustainability Guidance is as practical and helpful to business as possible. If you think that there are situations where additional guidance would be helpful or where the examples we have used could be made clearer or more specific, please let us know.**

Enforcement and protection from fines

2.1 We welcome the CMA's clear commitment not to take enforcement action and/or impose fines against agreements that comply with the Guidance and, in particular, those in respect of which the parties have consulted the CMA to confirm such compliance. However, we have two reservations that such guidance might not be enough to incentivise businesses to engage in such agreements.

2.2 First, the Draft Guidance appears to offer two, separate, protections. The first is a promise to not enforce (paragraph 7.10), and the second is a protection from fines (albeit potentially no protection from the imposition of other remedies) (paragraph 7.12). The difference between the two is that the first relates to cases where the parties implement agreements that clearly correspond to the examples in the Guidance. The second relates to where the agreement was discussed with the CMA in advance, the CMA did not raise issues, no material relevant information was withheld, and the parties made adjustments (as necessary) to adapt to unexpected changes. The second also appears to include cases that fall within the Guidance but the parties nonetheless came to the CMA.

2.3 Our concern is that, in the second example, the CMA appears to be contemplating taking enforcement action against those companies – the protection is that such enforcement will not lead to any fines. It is unclear to us why that is the case. What is the material distinction between the cases such that, for the first, the CMA will not enforce, but in the second case the CMA considers enforcement action may be warranted (particularly given there is an overlap between the cases)? In our view, the Draft Guidance should commit that, in both categories of case, it will neither take enforcement action nor impose fines.

2.4 Our second concern relates to the fact that the Guidance is not binding on the courts. Businesses may therefore take the view that it does not sufficiently protect them from the risk of private litigation against their climate change agreements on the basis of both UK case law and Retained EU case law, which indicates that efficiencies must entirely compensate consumers within the relevant market.[2] This risk will be exacerbated by the CMA's intention to publish details of the arrangements that parties have disclosed to it (paragraph 7.13 of the Draft Guidance).

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[2] For instance, *Sainsbury's v Mastercard* [2020] UKSC 24, paragraphs 173-174 and Case T-131/99 *Shaw* ECLI:EU:T:2002:83, para. 156.

2.5 We therefore submit that the CMA should advocate to Government for appropriate legislative measures (for instance in the forthcoming Digital Markets Competition and Consumer Bill) which confirm that Section 9(1)(a)(ii) CA98 is to be interpreted as allowing for "out of market" efficiencies to be taken into account in relation to climate change agreements (and, indeed other agreements, in line with our comments at paragraph 3.3 below).

Ongoing guidance and process

2.6 We welcome the CMA's intention to publish updated guidance from time to time to provide further examples and summaries of initiatives with an assessment of risks and solutions (see paragraphs 1.14 and 7.13 of the Draft Guidance). This is particularly important, as it will provide businesses with a wider range of precedents against which to assess their proposed agreements, which will also instil further confidence in the applicability of the Draft Guidance. However, the approach to publication should be considered carefully as this will need to be balanced with the parties' need for confidentiality to protect from the risk of private litigation, as noted above in paragraph 2.4.

2.7 Furthermore, as the CMA proceeds to issue informal guidance on proposed initiatives, the CMA will need to apply a clear and consistent approach to cases to instil confidence in the process. Although sustainability is a relatively novel theme in competition law and authorities are still exploring emerging issues alongside businesses, the CMA should avoid at all costs issuing conflicting informal guidance or enforcement action to ensure the success of the Draft Guidance. To the extent the CMA's approach is considered a leading authority in this regard, it is more likely that other competition authorities will follow suit. This is particularly important for global businesses which manage cross-border projects and therefore need to remain attentive to developments in different jurisdictions. In the instance that standards and policies differ across jurisdictions, internal compliance teams will more likely apply the most conservative approach regardless of whether the agreements could be exempt in the UK.

3. **We are also keen to ensure that the description of the agreements in Section 2 of the Draft Sustainability Guidance is sufficiently clear so that businesses are in no doubt as to whether their agreement is covered by the Guidance.**

a) Are there any changes that you feel would improve the description of environmental sustainability agreements?

3.1 We welcome the CMA's efforts to clarify which agreements would qualify as environmental sustainability agreements under the Draft Guidance. We also agree that the list of examples provided in paragraph 2.2 of the Draft Guidance should be non-exhaustive, and that the CMA should update its Guidance with additional examples to reflect the various initiatives that are brought to the CMA's attention in the future.

b) Are there any changes that you feel would improve the description of climate change agreements (including in footnote 4)?

3.2 If the CMA applies the proposed "*more permissive approach*" to the Chapter I Exemption to climate change agreements, but not environmental sustainability

agreements, we consider that the relationship between environmental sustainability agreements and climate change agreements requires further clarification. In particular, it is unclear whether an environmental sustainability agreement whose "*centre of gravity*" is geared towards, for example, mitigating the loss of biodiversity or promoting the sustainable use of raw materials, could qualify as a climate change agreement if it simultaneously contributes to the UK's binding climate change targets – even if such contributions are ancillary to the agreement's main objective.

3.3 Notwithstanding the above, and in the interests of certainty and simplicity of application of the Guidance for undertakings, we consider that the CMA's proposed approach to the "*fair share to consumers*" condition for climate change agreements can and should be applied to all environmental sustainability benefits – not just those arising from climate change agreements (as defined in the Draft Guidance). This approach would be in line with existing case law on the application of the Chapter I Exemption,[3] ensure greater consistency for the assessment of environmental sustainability benefits under the Chapter I Exemption, and give undertakings greater flexibility in adopting more environmentally sustainable practices. However, as noted the Draft Guidance, the relevant undertakings would still need to be able to demonstrate that (i) the totality of the benefits to society as a whole outweigh the potential harm to competition resulting from the agreement, and (ii) the consumers within the relevant market(s) receive a "*fair share*" of the resulting benefit, even if they are not fully compensated.

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[3] Draft Guidance, paragraph 6.7.